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INTELLECTUAL PROPERTY HARMS: A PARADIGM FOR THE TWENTY-FIRST CENTURY

JESSICA SILBEY*

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INTRODUCTION

Professor Wendy Gordon is a colleague whose persistent, enthusiastic engagement in complex conversations about intellectual property has elevated our field. Admirable features of those conversations are Professor Gordon's openness to multiple disciplinary perspectives and insistence upon rigor. In a short symposium essay, I cannot achieve the rigor Gordon's standards demand. But I hope the discussion below fruitfully extends the debate about "IP harms" to help structure the reforms that many in the field seek and that Professor Gordon has been instrumental in leading.

Professor Gordon's scholarship is seminal to our understanding of IP harms. Her scholarship analyzes the range of harms and benefits that flow from legal protection of IP, especially when compared to property and tort regimes and the ways in which we justify them in terms of internalizing both positive and negative effects. The breadth of her scholarship on this score is too vast to summarize here, but key terms she distinguishes and analyzes include restitution, uncompensated benefits, foregone licensing fees, substitutional rivalry, unjust enrichment, and subjective distress.¹ Foundational to these discussions is the conception of the individual person and her legal interests. One of Gordon's most famous articles, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, anchors a vital role for IP law in the protection of one's right to express oneself as a necessary consequence of natural rights theory, which may paradoxically limit the extension of IP and expand the public domain.² This Essay engages these two monumental contributions to the IP literature rooted in philosophy and economics with an analysis of evidence from everyday creators and innovators of harm that they and their work have experienced. As such, this Essay interjects into the debate a new and interdisciplinary perspective on "IP harms" from

¹ See generally Wendy J. Gordon, *The Concept of "Harm" in Copyright*, in INTELLECTUAL PROPERTY AND THE COMMON LAW 452 (Shyamkrishna Balganesh ed., 2013) [hereinafter Gordon, *The Concept of "Harm"*]; Wendy J. Gordon, *Copyright as Tort Law's Mirror Image: "Harms," "Benefits," and the Uses and Limits of Analogy*, 34 MCGEORGE L. REV. 533 (2003); Wendy J. Gordon, *Fair Use Markets: On Weighing Potential License Fees*, 79 GEO. WASH. L. REV. 1814 (2011); Wendy J. Gordon, *Harmless Use: Gleaning from Fields of Copyrighted Works*, 77 FORDHAM L. REV. 2411 (2009) [hereinafter Gordon, *Harmless Use*]; Wendy J. Gordon, *Of Harms and Benefits: Torts, Restitution, and Intellectual Property*, 21 J. LEGAL STUD. 449, 452 (1992) [hereinafter Gordon, *Of Harms and Benefits*]; Wendy J. Gordon, *Toward a Jurisprudence of Benefits: The Norms of Copyright and the Problem of Private Censorship*, 57 U. CHI. L. REV. 1009 (1990).

² Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1539 (1993) ("In sum, rather than depending on the constitutional free speech doctrine to which intellectual property courts have been too often insensitive, this Article turns instead to the very arguments that proponents of intellectual property use to defend more extensive owner control. I attempt to show how, fairly understood, these arguments lead instead to limited property rights for individual proprietors—and to significant property rights for the public.").

within a qualitative empirical framework. The analysis of the empirical evidence also reorients the locus of harm from individuals to groups of individuals, who are organized as communities, through systems and in institutions, extending Gordon's emphasis on the public domain. By departing from the central disciplinary and conceptual philosophical and economic frames for which Professor Gordon is justifiably praised, I hope to honor her legacy as a broad-minded and passionate scholar who persists to question assumptions and challenge established doctrine in our field to improve both the law and the people and ideals it serves.

By way of brief background, this Essay is adapted from a book I am writing called *Against Progress: Intellectual Property and Fundamental Values in the Internet Age*.³ The book's primary argument is that, with the rise of digital technology and the ubiquity of the internet, the mainstreaming of IP in law and culture since the late-twentieth century exposes ongoing debates about "progress of science and the useful arts"—the constitutional purpose of IP rights.⁴ In short, the book describes how historically and doctrinally IP law focused on economic models of progress, which were thinly framed in terms of wealth accumulation and market theories facilitating economic growth.⁵ With the rise of digital technology in the late twentieth century, IP's focus on economic markets increased the scope of federal IP rights and thus increased the amount of IP itself—more copyrighted works, more patents, and more trademarks.⁶ Despite expanding scope and the rise of "more," *Against Progress* explains that late-twentieth century and twenty-first century IP practice challenges the "Progress

³ See generally JESSICA SILBEY, *AGAINST PROGRESS: INTELLECTUAL PROPERTY AND FUNDAMENTAL VALUES IN THE INTERNET AGE* (forthcoming 2020).

⁴ U.S. CONST. art I, § 8, cl. 8 ("[The Congress shall have power] [t]o promote the Progress of Science and useful Arts . . .").

⁵ For canonical writing on the economic roots of intellectual property, see generally WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* (2003).

⁶ For scholarship on problems of increasing scope in IP, see Jeanne C. Fromer & Mark P. McKenna, *Claiming Design*, 167 U. PA. L. REV. 123, 123-24 (2018); Mark A. Lemley & Mark P. McKenna, *Scope*, 57 WM. & MARY L. REV. 2197, 2202 (2016); Jessica Litman, *Billowing White Goo*, 31 COLUM. J.L. & ARTS 587, 587 (2008). I understand that trademarks are authorized not by the "progress" clause of the Constitution but by its Commerce Clause. But insofar as progress is measured by "more" in the twentieth century, more distinctiveness and more competition—trademark law's hallmarks—are considered good things too. Trade secret and right of publicity are also relevant intellectual property doctrines that have expanded in scope over the past several decades. See generally JENNIFER E. ROTHMAN, *THE RIGHT OF PUBLICITY: PRIVACY REIMAGINED FOR A PUBLIC WORLD* (2018) (tracing evolution of right of publicity as an expanded right of privacy through the twentieth century); Sharon K. Sandeen, *The Evolution of Trade Secret Law and Why Courts Commit Error When They Do Not Follow the Uniform Trade Secrets Act*, 33 HAMLINE L. REV. 493, 493-96 (2010) (discussing evolution of trade secret law from common law to enactment of Uniform Trade Secret Act). Due to scope and time restraints, I have limited my analysis in the book largely to copyright, patent, and trademark.

as more” paradigm.⁷ Through various methodological interventions—close reading of cases, doctrinal analysis, and various qualitative empirical methods—*Against Progress* demonstrates how contemporary accounts of IP are not primarily anchored by claims of “more” or in economic-growth terms. Instead, creative and innovative practices (and disputes concerning them) revolve around adjacent values and principles central to our constitutional system such as equality, privacy, and general welfare.

The founders of the United States and its Constitution understood IP to achieve “Progress of Science and useful Arts” by granting authors and inventors durationally limited, property-like rights in their writings and inventions.⁸ But contemporary conversations about creativity and innovation in flourishing economies and communities reveal that exclusivity and property-like rights may degrade, not develop, community sustainability.⁹ In other words, property rights and the economic models that have sustained them are under critical scrutiny in the new century. Supplanting them are other fundamental rights deeply rooted in our constitutional system, which, like economic models of flourishing markets, are also subject to reconfiguration in our digital age. *Against Progress* argues that current creativity and innovation and the IP law that structures it are developing from the new human and digital networks of the twenty-first century, which are reinvigorating and reconfiguring twentieth-century social and political values for our internet age. These values, such as equality, privacy, and distributive justice, are central to human dignity but have been largely absent from IP policy. The book describes these debates about IP over these values as a bellwether of changing social-justice needs in the internet age.

The early parts of *Against Progress* make a case for equality, privacy, and distributive justice as frames for contemporary disputes about IP, law, and creative practices.¹⁰ The latter parts of *Against Progress*, from which this Essay draws, reflect on those values as protecting against certain kinds of harms but not the usual harms that IP law is understood to prevent. Typically, IP injuries are conceived in individual terms and as economic injuries. An infringer is a

⁷ See SILBEY, *supra* note 3.

⁸ U.S. CONST. art I, § 8, cl. 3.

⁹ For an early and by now canonical example of a critique of intellectual property rights and “Progress of Science and useful Arts,” see generally Michael A. Heller & Rebecca S. Eisenberg, *Can Patents Deter Innovation? The Anticommons in Biomedical Research*, 280 SCI. 698 (1998).

¹⁰ For early versions of these arguments, see generally Eric Goldman & Jessica Silbey, *Copyright’s Memory Hole*, 2019 BYU L. REV. (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3351348 [https://perma.cc/YRA8-NBHF]; Jessica Silbey, *Fairer Uses*, 96 B.U. L. REV. 857 (2016) [hereinafter Silbey, *Fairer Uses*]; Jessica Silbey, *Reading Intellectual Property Reform Through the Lens of Constitutional Equality*, 50 TULSA L. REV. 549 (2015).

thief.¹¹ A corporation overclaiming IP rights is greedy or engaged in immoral financial conquest.¹² IP harms are conceived as substitutional rivalry, foregone licensing fees, or loss of exclusivity.¹³ The individualized terms are unmistakable. Often, injuries sound like one-to-one combat, with underdogs, heroes, and villains, perhaps as a result of the adversarial system structuring disputes in terms of individualized parties facing off against each other.¹⁴ Complainants suffer because of bad motive or bad acts with volition and intent, critical components of the claims.¹⁵

The IP harms this Essay highlights are different, however: they are harms to communities, systems, and institutions. Although unmistakably composed of individual people, the health of these communities, systems, and institutions as such is the focus of IP complaints. The broader argument is that IP harms in the early twenty-first century digital ecosystem erode the essential connections that secure individuals in meaningful and functioning groups (communities, organizations, and institutions), on which we rely to live and work. When a focus on individuals fades and the interrelatedness and structure of social life emerges, the shape and purposes of IP law shift and demand new explanations. This Essay explains the contours of this shift in both theoretical and empirical terms as mechanisms of connectivity and relatedness and as describing a shared fate in the internet age. Part I establishes a framework of the move from individual to system and structure. Part II draws on interview accounts from everyday creators and innovators that explain IP harms as degrading essential structure and relations. Drawing on qualitative empirical data, Part II further explores how everyday creators and innovators—in their accounts of IP harms—champion the central role of law, its systems and structures, and the sociopolitical and economic organizations it makes possible to promote fundamental values. The Essay concludes briefly with further research questions.

¹¹ See *Grand Upright Music Ltd. v. Warner Bros. Records, Inc.*, 780 F. Supp. 182, 183 (S.D.N.Y. 1991) (beginning one of first cases to deal with digital sampling with admonition “[t]hou shalt not steal”).

¹² See Colleen V. Chien, *Of Trolls, Davids, Goliaths, and Kings: Narratives and Evidence of the Litigation of High-Tech Patents*, 87 N.C. L. REV. 1571, 1576 (2009) (“This Article puts these concerns into context by identifying the major stories of patent litigation and then matching actual suits, based on party profile, to these stories.”).

¹³ See Gordon, *The Concept of “Harm,”* *supra* note 1, at 462-63 (describing these injuries).

¹⁴ See Chien, *supra* note 12, at 1577 (“While each patent dispute is unique, most fit the profile of one of a limited number of patent litigation stories.”).

¹⁵ For a well-cited example of evading infringement liability because of lack of volition, see *Cartoon Network, LP v. CSC Holdings, Inc.*, 536 F.3d 121, 131-33 (2d Cir. 2008), which rejected liability for a cable company’s direct infringement because the copying was done at the direction of users, who were not sued. See generally Mala Chatterjee & Jeanne C. Fromer, *Minds, Machines, and the Law: The Case of Volition in Copyright Law*, 119 COLUM. L. REV. (forthcoming 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3392675 [<https://perma.cc/J6C9-VY3P>].

I. AN INTELLECTUAL PROPERTY FRAMEWORK
FOR THE TWENTY-FIRST CENTURY

The shift from an individual analysis to a structural one makes sense when we think of IP and its constituent elements as themselves products of systems and organizations. IP law tends to focus on the “author,” “inventor,” “consumer,” and “brand owner” as the agents of copyright, patent, or trademark law. This Essay instead explains how the accounts of everyday creators and innovators elaborate upon the inevitable—but often invisible—connections between those individual agents, the practices in which they engage, and the structures in which both are situated. These systemic connections make persons into authors, inventors, consumers, or brand owners while simultaneously enacting the structural mechanisms through which creativity and innovation are produced and regulated by law and other institutions (e.g., professional organizations). These connections constitute IP as a system of interactive and interdependent relations forming larger structures to be investigated as such.

Understanding IP as a set of systems in terms of their content, processes, and context may clarify the analysis of IP disputes and discourses to help diagnose deeply rooted problems of IP in the digital age and suggest possible solutions. For example, some of the IP problems arising in the digital age concern the virality of copying and its opportunities and drawbacks, which include more sharing and productivity, but perhaps also less equality, privacy, and revenue for those doing the lion’s share of work.¹⁶ Disputes among individual entities resemble zero-sum debates where one person’s win is the other person’s loss.¹⁷ And individual remedies such as injunctions and payment do not prevent the problems from reoccurring.¹⁸ As all know who have chased a take-down request

¹⁶ For an early discussion of the digital-age problems of networked communications and intellectual property law, see generally Alfred C. Yen, *Internet Service Provider Liability for Subscriber Copyright Infringement, Enterprise Liability, and the First Amendment*, 88 GEO. L.J. 1833 (2000). For a more recent article, see generally Annemarie Bridy, *Is Online Copyright Enforcement Scalable?*, 13 VAND. J. ENT. & TECH. L. 695 (2011).

¹⁷ In her comments at the symposium of which this Essay is a part, Professor Rochelle Cooper Dreyfuss described the problem of focusing on individuals rather than institutions in IP as exacerbated by the litigation structure of “plaintiffs versus defendants.” I am grateful to Professor Dreyfuss for her remarks at the conference, which clarified my thinking for this Essay. See also Rochelle Cooper Dreyfuss, *Expressive Genericity: Trademarks as Language in the Pepsi Generation*, 65 NOTRE DAME L. REV. 397, 407 (1990) (explaining how courts are so busy thinking about parties, they do not consider the public interest that parties—usually defendants—represent).

¹⁸ For discussions of complexities of injunctive relief after the Supreme Court’s decision in *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 394 (2006), in which the Court held that injunction does not necessarily follow from a finding of infringement, see Peter J. Karol, *Trademark’s eBay Problem*, 26 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 627, 636-37 (2016), and Christopher B. Searman, *Permanent Injunctions in Patent Litigation After eBay: An Empirical Study*, 101 IOWA L. REV. 1949, 1968-74 (2008). See also Annemarie Bridy, *Why*

or unknowingly bought counterfeit goods, the internet resembles a game of whack-a-mole.¹⁹ But when we analyze individual injuries in terms of their emergent structure, with particular, identifiable characteristics and patterns of actions, the mechanisms and relationships that explain the problems of digital connectivity become more readily identifiable, as do the benefits we seek from the system that may be failing us. To be sure, the IP system as a whole is constitutive of participants' beliefs and behaviors, but they change and adapt in character and effect when part of a larger structure. For example, when a person complains of a particular infringement by another, it may sound like a dispute about a person taking without asking. If viewed in the context of a structure that is instantiated by repeated practices and predictable winners, the harm may be better understood as a system in which foreseeable users experience outsized benefits and others experience regular, unjustified losses. This reconceives the analysis from a zero-sum calculation where one person loses because another person wins to a system-level analysis, in which system-quality metrics include proportionality, fairness, accountability, and transparency.

Trenchant critiques of IP as a dysfunctional system without qualities of proportionality and fairness, for example, appear in the accounts from everyday creators and innovators. Everyday creators and innovators describe the current IP system as corrupted by incumbency bias, profoundly out of balance in terms of contributions, risks, and rewards and plagued by a breakdown in civility norms such as meanness and cutthroat behavior. In contrast and by implication, their ideal system would cultivate a sense of shared interdependence, punish coercion and threats, disincentivize exclusivity and hierarchy that lacks social and shared benefits, reward only truly new and original work to avoid wasted time and money, and enable more freedom to work. In sum, accounts from everyday creators and innovators arrive at a moral consensus that demands cooperation to produce quality work and minimizes destructive competition that produces mediocrity or stifles better work from being done. As the below accounts show, everyday creators and innovators expect reasonable disagreement and principled restraint among participants. But they also assume a baseline of truthfulness, transparency, and respect for others. Contrary to the IP legal system they experience, an ideal IP regime would prioritize punishment of lies, misrepresentation, and denigrating practices over protecting exclusivity and control for market gains.

This moral consensus about how an IP system should ideally function sounds like a reaction to what contemporary sociopolitical literature describes as

Pirates (Still) Won't Behave: Regulating P2P in the Decade After Napster, 40 *RUTGERS L.J.* 565, 583 (2009) (discussing use of preliminary injunctions to regulate peer-to-peer networks).

¹⁹ See T. Randolph Beard, George S. Ford & Michael Stern, *Safe Harbors and the Evolution of Online Platform Markets: An Economic Analysis*, 36 *CARDOZO ARTS & ENT. L.J.* 309, 314 (2018) ("Notice-and-takedown has proven little more than a game of Whack-A-Mole for rights-holders, where removed content is often quickly replaced with new infringing files.").

precarity or precarization, i.e., the state or production of insecurity and vulnerability regarding cultural and economic resources unevenly distributed.²⁰ Precarity produces the experience of disenfranchisement, displacement, and uncertainty regarding one's expectation for future betterment, both as an individual and as a member of a community.²¹ It is described as a function of advanced capitalist society in which free-market ideologies dominate, capacity for collective action weakens, and feelings of belonging are about identity and difference rather than mutual interdependence and a shared fate.²²

Some suggest that precarity is strongly experienced in the creative and innovative industries, where "regimes of intellectual property operate as an architecture of division[,] . . . produc[ing] a new class relation special to the information age."²³ Missing from the twenty-first century digital ecosystem—and therefore exacerbating precarity—are affective relations with invigorated political power built around the new forms of work and new class alliances. These affective relations fail to emerge at all (or regularly) to resist the growing and diverse forms of domination by consolidated wealth and the power of networked, digital capital.²⁴ Thus, it seems that complaints about the IP legal system and its subversion of affective alliances are expressions of resistance to the property relations that define the IP legal system and that claim to build

²⁰ See Sharryn Kasmir, *Precarity*, in THE CAMBRIDGE ENCYCLOPEDIA OF ANTHROPOLOGY (F. Stein et al. eds., 2018), <http://www.anthroencyclopedia.com/entry/precarity> [<https://perma.cc/7A4Q-N445>] ("Precarity is a multi-stranded concept, associated with a set of terms, including precarious, precariousness, precaritization, and 'the precariat', that make an historical argument about capitalism, pronounce a shift in class relations, and predict novel social movements and political struggles."); see also ISABELL LOREY, STATE OF INSECURITY: GOVERNMENT OF THE PRECARIOUS 10-12 (Aileen Derieg trans., 2015) (describing precarity as a condition of human existence); Brett Neilson & Ned Rossiter, *Precarity as a Political Concept, or, Fordism as Exception*, THEORY CULTURE & SOC'Y, Dec. 2008, at 51, 54 ("To understand precarity as a political concept we must revisit the whole Fordist episode, its modes of labour organization, welfare support, technological innovation and political contestation."); Guy Standing, *The Precariat: From Denizens to Citizens?*, 44 POLITY 588, 591 (2012) ("In sum, those in the precariat have precarious jobs, without a sense of occupational identity or career in front of them, they have no social memory on which to draw, no shadow of the future hanging over their relationships, and have a limited and precarious range of right.").

²¹ Charles Masquelier, *Bourdieu, Foucault, and the Politics of Precarity*, 20 DISTINKTION 135, 136-44 (2018).

²² See *id.* at 4, 6 (quoting LOREY, *supra* note 20, at 15, 94, 111) (discussing precarity in Foucaultian terms).

²³ Neilson & Rossiter, *supra* note 20, at 59 (noting internet's extension of IP regimes—such as copyright in cultural industries, patents in technological industries, and trademarks in advertising—despite internet playing especially large role in new levels of precarity).

²⁴ See JULIE E. COHEN, BETWEEN TRUTH AND POWER: THE LEGAL CONSTRUCTIONS OF INFORMATIONAL CAPITALISM 45 (2019) ("The combination of scale, asserted contractual control, and technical control enacts enclosure of both data and algorithmic logics as an inexorable reality of twenty-first century networked commercial life.").

connections when in fact they produce divisions.²⁵ The accounts from everyday creators and innovators conjure an ideal structure with moral narratives of collaboration, accountability, and quality standards that contrast with the digital age's exacerbation of IP's emphasis on ownership and exclusivity. Despite a digital age that amplifies rather than reduces precarity, the accumulated accounts from everyday creators and innovators revive what in the past was called "the commons" but today is promoted as the critical public sphere.²⁶

These accounts from everyday creators and innovators defy the pull of the hegemonic capitalist narrative fueled by supply, demand, control, and scarcity. That hegemonic story goes like this: we work hard to make something valuable, and law—like the laws of patents, copyrights, and so on—gives us a way to prevent someone from taking it away without paying.²⁷ In this story of law and capital, equality is achieved when law treats alike all who create and innovate according to the same standards, and freedom is realized by making and selling valuable things that enable us to move between socioeconomic classes. Notice how in this story of capitalism, law and the state's authority to protect it assume a precarity of power and self-determination in the very activity of producing art and science.²⁸ We require the state to protect that which we make and value. This generates a discursive circularity and produces further insecurity in the person's relationship to the state by demanding more laws that facilitate more individual control, ownership, and thus also division.²⁹

We avoid this circularity by telling a different but similarly available story—one everyday creators and innovators tell—which goes like this: we work long and hard to do and make things whether or not it is valued by the capital marketplace because doing so gives us purpose.³⁰ In this alternative account, the intrinsic pull of creativity and innovation is so strong that the art and science continues even in a time where market and ownership interests seem to outweigh all others.³¹ This subversive story (as related to the hegemonic one above) forces

²⁵ See Neilson & Rossiter, *supra* note 20, at 59 (explaining how "antagonism" between creators and controllers of intellectual property "moves around a property relation").

²⁶ Compare Mark Rose, *The Public Sphere and the Emergence of Copyright: Areopagitica, the Stationers' Company, and the Statute of Anne*, 12 TUL. J. TECH. & INTELL. PROP. 123, 132-44 (2009) (exploring emergence of copyright law within Habermasian public sphere in 1600s and 1700s), with LEWIS HYDE, *COMMON AS AIR: REVOLUTION, ART, AND OWNERSHIP* 13-14 (2010) (describing cultural commons of twentieth and twenty-first centuries and rendering common assets visible for appropriate public stewardship).

²⁷ Brian L. Frye, *IP as Metaphor*, 18 CHAP. L. REV. 735, 737 (2015) (explaining how IP law concepts, such as patents and copyrights, prevent "free riding" in innovation market).

²⁸ See LOREY, *supra* note 20, at 64-65 (exploring how state can utilize precarity as "normalized mode of governing").

²⁹ See *id.* (exploring how state actions create divisions and security).

³⁰ See *infra* Part II (exploring narratives of labor).

³¹ HYDE, *supra* note 26, at 12 ("[T]he West [has] entered a period of unabashed market triumphalism, during which many things long assumed to be public or common . . . were

a reckoning.³² It becomes possible to think that protecting work by claiming it as private property is not primarily about the value of capital and remuneration but about justifying the activity as worthy in and of itself—a progress separate from market progress, one that is based in interpersonal dignity and affective relations.³³ This story revolves around mutual respect, self-determination, and voluntarism.³⁴

This alternative account emerges from the stories of everyday creators and innovators and contradicts the story of capital accumulation as the primary end of creative and innovative work. As described more fully below, substantially in the words of creators themselves, a sociolegal system degrades people and the collective work they love when it refuses to recognize this alternative narrative of creativity and innovation that celebrates processes, collaborative systems, and the communities that produce them. Further, ignoring these sustaining social situations produces anxieties, such as who will see and care for creators and innovators as people who want to work. Such anxieties fuel protectivism that amplifies worries about resource scarcity and leads to privatization and selfishness, thus feeding the hegemonic story described above as the most obvious story in our legal system. This returns us to the focus on capital accumulation at the expense of the everyday value of work and its motivating affective relations.³⁵ It also signals a more basic problem in civil society in the digital age: the dissolution of trust and investment in the interdependence of human communities.³⁶

removed from the public sphere and made subject to the exclusive rights of private ownership.”).

³² See Patricia Ewick & Susan S. Silbey, *Subversive Stories and Hegemonic Tales: Toward a Sociology of Narrative*, 29 LAW & SOC’Y REV. 197, 217-19 (1995) (exploring how subversive narratives undermine hegemonic narratives, producing opportunities for resistance to social and political structures).

³³ See Barton Beebe, Bleistein, *The Problem of Aesthetic Progress, and the Making of American Copyright Law*, 117 COLUM. L. REV. 319, 330 (2017) (critiquing copyright doctrine originating from *Bleistein* and its measurement of “aesthetic progress” as commercial success); see also JESSICA SILBEY, *THE EUREKA MYTH: CREATORS, INNOVATORS, AND EVERYDAY INTELLECTUAL PROPERTY* 68-69 (2015) (“[A]lthough the law grants creators and innovators the rights to *intangibles* (i.e., intellectual property), in the context of my interviews, the overwhelming focus of pleasure and drive concerns *tangible* work output, physical skills, and personal connection to the work (and to appreciative audiences).”).

³⁴ See SILBEY, *supra* note 33, at 55.

³⁵ See *infra* Part II (exploring narratives of anxiety, frustration, hegemony, and resistance).

³⁶ SHOSHANA ZUBOFF, *THE AGE OF SURVEILLANCE CAPITALISM* 7 (2019) (“[Many older] visionary projects imagined a digital future that empowers individuals to lead more-effective lives. Today [the] rights to privacy, knowledge, and application have been usurped by a bold market venture powered by unilateral claims to others’ experience and the knowledge that flows from it.”).

What follows in Part II is an elaboration of the harms mentioned above based on the accounts of everyday creators and innovators.³⁷ These harms implicate the environment in which creators and innovators expect their practices to flourish, and thus their critiques are about the environment's failures to knit together sustaining communities of creative and innovative practices. Arising from within contexts of the production of creative and innovative work, these accounts are transactional and dynamic rather than substantive or static. This is important for two reasons: First, the accounts reject essential or preexisting notions of harm—for example, that loss (of money) is necessarily bad.³⁸ A transactional account considers the situational context of the “loss” to understand its significance in terms of an ongoing set of discursive or material relations.³⁹ Second, and relatedly, transactional and dynamic accounts of harm conceive the field of IP as a set of actions rather than attributes. This takes us closer to examining possibilities for a reformative transformation of how we conceptualize IP and the solution to IP-related harms. For example, instead of describing standard IP harms to individuals as uncompensated losses or unpaid-for benefits, everyday creators and innovators describe broken IP systems that prioritize short-term thinking rather than long-term relationships. This reformulation subordinates the privilege of current value to a future with shared benefits, challenging law to conceptualize solutions to harm avoidance in longer time frames and in terms of sustainable personal relations and social structures.⁴⁰

In this digital age, where expression and inventions travel faster and farther than ever before, the harm of depleted income and stolen assets may accelerate claims for control, exploit precarity, and accentuate individual economic incentives, thus further pitting people against each other. But when taken seriously and on their own terms, these accounts of IP harms from everyday creators and innovators critique a capital system measured by individual attributes and motivations, redirecting attention to systems, practices, and communities with a dynamic structure made more visible and powerful by the digital age's ability to raise all boats in a collective tide. These everyday accounts focus on securing affective and respectful relations of work and community to shore up a vital public sphere rather than the individual pursuit of the maximum private reward as a means of warding off fear and insecurity. The critique of the existing IP structure surfaces hopes for structural change, also

³⁷ See *infra* Part II (exploring harms experienced by creators and innovators).

³⁸ See SILBEY, *supra* note 33, at 71 (comparing maximizing IP income to “milk[ing] the cow and then kill[ing] it”).

³⁹ See Gordon, *Of Harms and Benefits*, *supra* note 1, at 462-63 (exploring four ways creators suffer harm in market context).

⁴⁰ See *id.* at 468 (investigating interplay between copyrighted goods and problem of requiring payment for all benefits reaped, which destroys “synergy on which culture and commerce both rest”); see also Gordon, *Harmless Use*, *supra* note 1, at 2417-18 (exploring reciprocity inherent in authorial role as basis for discerning harmless uses from those for which there should be compensation).

made possible by the digital age.⁴¹ In their critique of IP law and hopes for a sustainable future, everyday creators and innovators champion a system in which trust and interdependence predominate and practices of sharing, collaboration, transparency, and reciprocity advance science and art.⁴²

II. THREE CATEGORIES OF INTELLECTUAL PROPERTY HARMS

Over the past ten years, I have been conducting face-to-face interviews with a range of creators and innovators, as well as their business partners and lawyers, in order to learn how IP works or does not work for them in their respective fields of practice. Interviews covered a wide range of people, companies, and fields, and my data set of transcripts and documents contains tens of thousands of pages, which I code and analyze using qualitative data-analytic software.⁴³ The data for this Essay includes the fifty interviews on which I based my first book, *The Eureka Myth: Creators, Innovators, and Everyday Intellectual Property*, and another fifty interviews that I have conducted, some alone and some with collaborators, since 2014.⁴⁴

A. Incumbency Bias and Civility Breakdown

In the interviews described above, descriptions of IP harms at first appear personal.⁴⁵ And yet when read as a whole and analyzed in terms of emergent themes, the interview accounts describe common justifications for law's coercive intervention: to prevent violence and unjust dominance, some of the most extreme and basic forms of societal injuries.⁴⁶ Accounts from everyday

⁴¹ See *infra* Section II.B (exploring narratives of IP system).

⁴² See *infra* Section II.C (exploring narratives about progress through collaboration).

⁴³ The brevity of this Essay prevents a more complete description of these interviews and empirical methods. See generally SILBEY, *supra* note 33, app. A at 287-95 (describing empirical method and stratification of interview subjects for first fifty interviews).

⁴⁴ In addition to my own research, I have two other recent, grant-funded, qualitative empirical projects with collaborators—one on photographers with Professors Peter DiCola and Eva Subotnik and another on designers with Professor Mark McKenna. See generally Jessica Silbey, *Control over Contemporary Photography: A Tangle of Copyright, Right of Publicity, and the First Amendment*, 42 COLUM. J.L. & ARTS 351 (2019) (exploring IP's relationship with photography and First Amendment); Jessica Silbey, *Justifying Copyright in the Age of Digital Reproduction: The Case of Photographers*, 9 U.C. IRVINE L. REV. 405 (2019) (exploring how photographers navigate modern copyright issues, especially originality determinations, derivative works, and exact copying on internet); Jessica Silbey, Eva Subotnik & Peter DiCola, *Existential Copyright and Professional Photography*, 95 NOTRE DAME L. REV. 263 (2019) (exploring how digital age affects aesthetic and business practices of contemporary professional photographers); Mark McKenna & Jessica Silbey, Presentation at the 2019 Intellectual Property Scholars Conference: Investigating Design (Aug. 8, 2019) (explaining research goals and processes related to design practice and design law).

⁴⁵ See, e.g., *infra* note 59 (expressing frustration with conduct of workers in pharmaceutical industry).

⁴⁶ See generally Max Weber, Address at Munich University: Politics as a Vocation (1918),

innovators and creators are replete with examples of these basic and deeply experienced harms, often expressed in metaphors for real violence.⁴⁷ For example, a software engineer and internet entrepreneur notes that:

[A]ll the companies that I work for, we all file patents. And we are pretty cynical about it, and we say, “We don’t think these patents are really necessarily going to ever be worth anything to us, except in this whole morass that is people wagging sticks at each other and saying, ‘I am going to sue you over your patents’”⁴⁸

More explicitly, a pharmacologist and IP attorney who works in the medical delivery business depicts violent threats in gendered terms that evoke patriarchal dominance in the context of asserting IP rights: “[T]o be totally frank with you, I’d say about 95% of the time, it’s men spraying testosterone. Which frustrates the crap out of me. It’s so unethical.”⁴⁹ An e-commerce entrepreneur working on his second successful company uses softer language to a similar though less gendered effect, describing aggressive patent assertion entities as having the capacity “to level this company . . . [and] put us out of business” if they wanted to.⁵⁰

This language of physical violence and the threat of physical destruction also describe extortion, i.e., the criminal offense of obtaining money or property from an individual or institution through coercion.⁵¹ Like physical violence, extortion resembles forms of basic societal breakdown or disorder. A general counsel for a digital technology company describes her experience with aggressive IP owners as “extraordinarily painful” because “companies [are asked] to pay

in FROM MAX WEBER: ESSAYS IN SOCIOLOGY 77 (H.H. Gerth & C. Wright Mills trans. & eds., Routledge 2009) (1946) (arguing that state has exclusive right to legitimate uses of force to prevent further violence).

⁴⁷ All interview accounts are anonymized and provided with pseudonyms here, as promised to interviewees to enable candid conversation. All interviews are also on file with the author.

⁴⁸ Interview with Kevin in Bos., Mass. (June 25, 2010). Kevin is a software and hardware engineer who also invests in high-technology companies that focus on telecommunications.

⁴⁹ Interview with Michael in Somerville, Mass. (Feb. 16, 2011). Michael is a pharmacologist and lawyer with his own consulting company that advises scientists, start-ups, and small and large businesses on how to manufacture their product for large-scale production and distribution.

⁵⁰ Interview with Scott in Watertown, Mass. (Aug. 21, 2012) (noting disparity between large companies with large collections of patents and startups with essentially no IP). Scott is a marketing executive with his own company that develops web-based marketing platforms and strategies. This is his second successful company.

⁵¹ See MODEL PENAL CODE § 223.4 (AM. LAW INST. 1962) (defining “Theft by Extortion” as obtaining property by threatening one or more of the following: (1) bodily injury or another crime, (2) accusing victim of a crime, (3) exposing a secret harmful to victim, (4) taking or withholding an official action or causing such to be done, (5) causing a strike or other collective action against victim, (6) testifying against or withholding testimony from victim, (7) inflicting any other harm on victim).

extortion in order to basically just make the [IP] litigation go away.”⁵² The language of physical violence emphasizes an experience of wrongdoing that resembles assault on a person or property, which it is the law’s basic purpose to prevent or punish.⁵³ But the professionals also emphasize an imbalance of power related to size and influence, which are central to many successful extortion schemes.⁵⁴ For example, some company executives describe the threat of patent litigation as a “shake down,” beginning with “unsophisticated small companies that don’t have a lot of patent experience.”⁵⁵ After developing a record of success in settlements with smaller companies, these same IP holders pursue larger entities and are able to settle for higher financial sums.⁵⁶ As one general counsel and vice president said, “they really identify the weak links in the chain [and] they go after them” as a strategy.⁵⁷ Those who have the bigger “stick” or can withstand the “squeezing” will survive the threats.⁵⁸ These accounts of hurt and fear describe a system without balance, plagued by incumbency bias, and whose civility norms have broken down.⁵⁹

By “without balance,” I mean disproportionate outcomes given the quality and quantity of inputs by different participants. And by “incumbency bias,” I mean the perpetuation of exclusivity and exclusion through past successes, whether justified or not. The latter has been analyzed in the sociolegal literature

⁵² Interview with Jacqueline in Waltham, Mass. (Sept. 26, 2008) (comparing costs of slow pace of IP litigation and, implicitly, settlements resulting from such litigation, to extortion). At the time of the interview, Jacqueline was an in-house general counsel of a privately held internet company that sells online content and space and whose initial public offering had recently stalled. In her earlier career, she was in-house counsel for other leading technology companies.

⁵³ See generally Weber, *supra* note 46 (arguing that only the state can use force legitimately).

⁵⁴ See MODEL PENAL CODE § 223.4 (describing extortion in terms implying significant power differential).

⁵⁵ Interview with Donald in Cambridge, Mass. (Apr. 29, 2008) (describing predatory litigation tactics of aggressive IP owners). Donald is an in-house attorney and vice-president for an e-commerce company that was recently acquired (after interview) for \$1 billion. In his earlier career, he worked for a publicly traded, multinational toy and entertainment company.

⁵⁶ *Id.* (“The first one they’ll settle for \$100,000. Then they want \$250,000, and then they want \$500,000.”).

⁵⁷ *Id.* (describing how aggressive IP owners become more ambitious in sought-after damages awards).

⁵⁸ *Id.* (“And you know, [large, unnamed new business partner is] famous for just *squeezing* people until they scream, until they die.”); Interview with Kevin, *supra* note 48 (expressing feeling that patents are worthless outside of “whole morass that is people wagging sticks at each other and saying, ‘I am going to sue you over your patents,’ and ‘No, you are not! Ha ha! Look at my patents here!’”).

⁵⁹ See, e.g., Interview with Michael, *supra* note 49 (“[T]here is a lot of unethical behavior that goes on in the pharmaceutical industry It’s just blind-ass pride.”).

in terms of “the ‘Haves’ come out ahead.”⁶⁰ The critical factor in the interview accounts is not, however, that the repeat players succeed because they have learned to play the game, but that repeat players succeed because their relative wealth and influence from past successes accumulates to assure their dominance and future successes.⁶¹ Both a lack of proportionality and a rigged system that maintains existing power and privilege predominate in the accounts of everyday creativity and innovation.

One common complaint among interviewees is that significant financial returns from IP rights do not correspond with meaningfully inventive or creative work. That is, the money made is out of proportion to the qualitative assessment of the work’s contribution to scientific and artistic progress.⁶² Moreover, the wealth generated does not adequately return to those doing the work. For example, a telecommunication entrepreneur describes invention in the software industry as

this giant body of knowledge . . . [,] most of [which] was invented before there were computers, and now people are adding to it a little teeny bit . . . [,] and they are saying, “Well, now that I have added a teeny bit . . . [,] you can’t send e-mail to a mobile device because I was the one who thought about sending a text message to the device to tell it it had e-mail!” [Y]ou must be kidding me! And yet, here we are: [Research in Motion, Ltd.] is out \$1 billion because some trolls got them on that.⁶³

A copyright licensing attorney, who works for a publishing company, describes similar criticism he hears about inequities relating input to gains. He explains: “[W]hat [people] say is, ‘We think everything should be free because it’s obscene how much money these people are making over here. I am working hard and I’m earning \$60,000, and Lindsay Lohan is earning [\$60 million], and, she can’t find her way out of a paper bag.’”⁶⁴ This is an exaggerated account of the critique of windfall profits, but he is not wrong about the critics, some of whom are on the distributor (not creator) side, like him. What rational explanation exists for such distorted and imbalanced returns? A music agent explains: “Every time . . . technological changes happen, the [music] industry

⁶⁰ See generally Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95 (1974) (exploring how success begets more success at others’ expense in American legal context).

⁶¹ See Interview with Donald, *supra* note 55 (describing escalating damages demands and power of some aggressive IP owners).

⁶² See SILBEY, *supra* note 33, at 84 (“Many . . . express frustration with the misfit between IP rules and the professional values that they cultivate in their daily work, like personal control over their time, fair earnings . . .”).

⁶³ Interview with Kevin, *supra* note 48.

⁶⁴ Interview with Samuel in Bos., Mass. (June 3, 2009). Samuel is a copyright attorney who is general counsel of a nonprofit licensing organization. In his earlier career, he was a senior in-house attorney for a national retail chain and a senior attorney at a large firm that specializes in IP and antitrust law.

just made more money selling the same music again, right? It's still the same music five times to the same customer, in a different format."⁶⁵ This agent explains that one significant basis for revenue inequity is technological change, which certain industry players can exploit more easily than others.⁶⁶ Supporting this claim, an independent film producer describes frustration with platforms and archives that have accumulated troves of photographs and that hold creators and filmmakers hostage for large sums of money to use essential raw material:

[I]t is rare, rare, rare that the person that actually took the photograph still owns it and holds it, and is selling you the rights. Extremely rare. . . . [I]t is most common that either it's collectors or historical societies often who have been given that material for free, right? Who are insisting on getting paid for it to be used. I can understand pay for copying costs, and pay for processing, . . . but oftentimes the pay goes way beyond that, as a moneymaking venue.⁶⁷

Thus, a colonialization of digital networks and the capture of technological changes explain the lack of proportionality in distributing rewards for creative and innovative work that is commercialized through those new technologies and networks.

These accounts cited above complain about disproportionality relating input to output from the system devoted to promoting "progress of science and the useful arts." Self-described as caught in a snare of being essential to the system but lacking in support to perform their function, everyday creators and innovators are asked to pay high costs to participate in a system that relies on them but that nonetheless fails to provide sufficient compensation to sustain their participation.⁶⁸ In their view, small contributions should reap smaller rewards, and smaller contributors or intermediaries should not be able to exploit the system to crush competitors or participants who are integral to the ecosystem and attempting to earn a living in an iteratively innovative environment. Those who labor within the system express dismay at the disproportionate earnings that are not explainable by talent but instead by timing and short-lived market fads. To them, the wrong people are making the money: not those who created the work but those whose luck or existing privilege enables them to cash in and

⁶⁵ Interview with Meredith in Bos., Mass. (May 18, 2010). Meredith is a music agent with her own marketing firm that specializes in promoting singer-songwriters but that also represents other kinds of artists and small businesses. Previously, she worked as a marketing executive at a large advertising agency. At the time of the interview, her firm was several years old and growing.

⁶⁶ *See id.*

⁶⁷ Interview with Ann in Watertown, Mass. (Oct. 25, 2011). Ann is an award-winning documentary filmmaker who has her own film production company. She is a former staff producer for public television.

⁶⁸ *See* Interview with Samuel, *supra* note 64 (lamenting fact that his compensation is not commensurate with value he adds to society).

exclude others. The same music agent describes a specific example in terms of the technological trends feeding off of independent musicians:

Bose suddenly has a section on their website just to sell their PA systems to independent musicians, right? You have got Sonicbids and OurStage, and these companies that have popped up to help these . . . independent artists reach everybody, but also, let's be honest: they know that, you know, 80% of the money that they are making [is] not from people who are going to have long-term music careers.⁶⁹

The independent film producer quoted above told a similar story.⁷⁰ The photo aggregators make all the money, while those making photos or films relying on using or licensing photos struggle to make ends meet. This does not make a lot of sense to creators and innovators or to the agents whose business supports them.

Behind these critiques is the sense that creators and innovators have very little choice but to accede to the will of the intermediary or to a system that favors the scale commercializers rather than the individual creator or innovator.⁷¹ One painter with successful gallery shows and a growing reputation complains that “people who buy a lot of art just think they can walk in and get what they want.”⁷² And because of the price instability of paintings, he feels particularly insecure about how to engage buyers without being exploited. Another artist, a sculptor whose livelihood depends on public commissions, describes the “gallery museum world” as “corrupt” but says the public commission process is entirely “based on honorable trust, it really is. The reality is that I say I’m gonna provide a good-quality product, and they say they’re gonna pay me, and I’m trusting them, they’re trusting me.”⁷³ Another sculptor with a busy public practice was less sanguine, echoing the coercion others report. He says:

[T]heoretically it’s a contract negotiation, in practice the city attorneys already got it down, and they’re not about to change almost anything. I’ve had some battles over certain bits of language, and occasionally I got some

⁶⁹ Interview with Meredith, *supra* note 65.

⁷⁰ See Interview with Ann, *supra* note 67.

⁷¹ See *id.* (“Now there’s also an entire industry that has grown around gathering, buying entire attic-fulls of footage that someone has turned into a business. They categorize it, they watch it, and then they sell it.”).

⁷² Interview with Leo in N.Y.C., N.Y. (July 9, 2010). Leo is a painter and retired lawyer in the later stages of life who has developed a reputation as an up-and-coming artist in the contemporary art scene. A lifetime philanthropist and an art collector with the money he earned as a lawyer, he now spends most of his time painting and showing his art in major galleries throughout the United States.

⁷³ Interview with Helen in Cambridge, Mass. (Oct. 6, 2011). Helen is a sculptor who focuses on public installations and has worked full-time as a sculptor nearly her entire career. She employs a studio assistant.

accommodation, but usually it comes down to take it or leave it. You want a job? . . . [S]ign the contract.⁷⁴

The take-it-or-leave-it approach to selling one's creative or innovative work may be the price we pay in a competitive market economy, but the lack of trust that artists describe undermines the virtue of open and fair markets. It also suggests a hierarchy of access and privilege. Those already with significant wealth or economy of scale control the welfare and opportunities of others, even if the new entrants or everyday artists and innovators provide essential fodder for those on the top. To many, this appears to be an unfair advantage, not fair competition. Even the business people who describe being overpowered by large or aggressive entities claim that the problem is not normal competition but an attitude and strategy of taking advantage through scale. An in-house counsel and IP attorney explained: "So because we're selling to so many large companies, those procurement people . . . [have the job] to just absolutely minimize the costs on everything. And so they will take advantage of you [T]hey're famous for just *squeezing* people until they scream, until they die."⁷⁵ A software entrepreneur with a strong service side to his business describes clients who seek to license his software as "almost coercive" because they contractually limit service charges for ongoing maintenance, putting his business "on the hook to do a lot of additional work for them" without any extra pay.⁷⁶ One might say that unequal bargaining power leads to these kinds of inequities, and it is not the IP system's job to fix them. But when IP lawyers and companies with some commercial leverage describe systemic distrust as part of IP regimes, IP as a system of law fails to adhere to basic rule-of-law principles such as transparency, reciprocity, and proportionality.

The overwhelming sense from the interview accounts is that there are "insiders" and "outsiders" in the IP system—those who have and quickly accumulate leverage and those who do not and are unlikely to do so. The description of "haves" and "have nots," or exclusion and inclusion in a system of opportunity, is also a picture of polarization—of giants and nobodies. There appear to be few companies or individuals who form a "middle class" of the creative or innovative enterprises, creating a specter of scarcity and fear. If true, or even believed, the system reproduces its own polarization and precarity.

⁷⁴ Interview with Max in Cambridge, Mass. (Oct. 13, 2011). Max is a sculptor with a focus on architectural works, an international reputation, and a collaborative partnership with his artist-wife. He employs a studio assistant and has worked on his art and architecture his entire career.

⁷⁵ Interview with Donald, *supra* note 55.

⁷⁶ Interview with Thomas in Cambridge, Mass. (Nov. 27, 2010) ("And so the way it was written was their initial contract severely limited increases in fees; it limited increases in fees, it put us on the hook to do a lot of additional work for them. . . . So it was almost coercive."). Thomas is a software engineer who founded his own company before graduating college and has worked as co-owner and partner since then, growing and diversifying his company's products and services, which revolve around data management. His company remains private.

Paradoxically, this generates claims for stronger protections by those who seek its help while also abandoning those most vulnerable to venal forces, which accumulate leverage under the stronger protections. Like the IP assets accumulated, the rights they protect are unevenly beneficial in a system that is ideally for all but that is in fact unrepresentative and unequitable in its application.⁷⁷

B. *Deleterious System Effects on Quality and Process*

To survive in a system that seems rigged against them, creators and innovators resort to tactics they call “playing dirty.”⁷⁸ When being sued by a nonpracticing entity, the general counsel of an educational software company said “the worst thing you can do is settle, even if you get a favorable settlement,” because that only encourages the plaintiff to continue with its litigation strategy.⁷⁹ As an example of playing dirty, this same lawyer said, “I want [the plaintiff] to remember that [our company], that those guys were just a royal f-in’ pain in the ass. That they were cheap; that they wouldn’t settle; that they gave me a million pages of toilet paper [in discovery], and that I don’t want to sue them again.”⁸⁰ Another IP lawyer at a small energy start-up describes how the engineers and business developers in his company that lead the most growth momentum are frequently “looking to get the edge” or “game the system” regarding patent filings, regulatory compliance, and contract negotiation.⁸¹ In the context of this interview, he speaks admirably about his colleagues, but like others he understands that playing by the rules (whatever those are) is not always advisable. Breaking them is better. He says about these colleagues:

I think the most successful inventors here are the people who are constantly looking for . . . how to buck the system. They see it as a challenge, like, “OK, those guys are doing *that*. Well, what if we do *this*? Will that get us

⁷⁷ Some recent quantitative empirical work confirms the sense of outsized winners in the IP industry. See Barton Beebe & Jeanne C. Fromer, *Are We Running Out of Trademarks? An Empirical Study of Trademark Depletion and Congestion*, 131 HARV. L. REV. 947, 1022 (2019) (describing advantages to incumbent trademark applications where “incumbents have already established their rights in increasingly depleted spaces”); Glynn S. Lunney, Jr., Copyright’s L Curve Problem 1, 5 (Feb. 19, 2019) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3338060 [<https://perma.cc/22GQ-GNQB>] (describing data on videogame industry whereby copyright overpays superstars but does very little for average author and for works at margins of profitability).

⁷⁸ See Interview with Donald, *supra* note 55 (“I know what those big law firms are like—they would rather spend \$500,000 than get their hands dirty.”).

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ See Interview with Ted in Bos., Mass. (Apr. 30, 2008) (describing competitive inventors attempting to get around other patents). At the time of the interview Ted was in-house attorney and vice-president of a small start-up energy company that was in its second decade. He had been an IP attorney at a law firm prior to working in-house.

around that? And what if we do *this*? Or hey, I read this article where they said they were going to do *this*. What about if we do *this*? Or what if we cut them off, and we file on this? Because we're doing something similar" [They are looking for] shortcuts, or just trying to get around things. They were probably horrible juvenile delinquents in their youth⁸²

It is an arbitrary and capricious system that requires flouting the rules to survive or thrive or that makes you a sucker for following the rules in good faith. In fact, such arbitrariness and capriciousness is no law at all. On the other hand, some flexibility in the law—or in any system—enables adaptation and accommodates diversity of participants and contexts. Within the structure of IP law, however, the system is not simply described as flexible to achieve its overall goal of "progress of science and useful arts." In this system, ordinary creativity and innovation practices underperform unless combined with rule breaking.

Creative and innovative professionals describe the IP system as having "plaque in its arteries" because it is "stopping the circulation of good ideas."⁸³ This complaint is less about individual people or entities (although sometimes it is) than about a system that enables and even encourages holdout behavior that stifles innovation and dissemination of science and art contrary to its underlying purpose. A composer and theater producer described the problem of avoiding copyright holders to license their material because the "downside is if I brought it to [their] attention and [they said] 'You can't sing this ever,' it means that all those kids next year won't get the chance to sing it."⁸⁴ A telecom entrepreneur describes patent enforcement that prevents interoperability that "dramatically shrank the market for [code-division multiple access]. So there's a great research opportunity for somebody to go figure out how that tradeoff happened. . . . I don't know if we got as much innovation and as much progress, because we pretty much had to let [the patent holder] do all of it."⁸⁵

A genetic biologist, who is also a trained attorney, describes holdouts in her field who say "'[n]o, we're not sharing anything,' even when it really has no

⁸² *Id.*

⁸³ Interview with Robert in N.Y.C., N.Y. (July 8, 2010). Robert is an award-winning chemist at a major research university who has also started a company (with outside investment and expertise) based on a patented invention that combines his expertise in computer software, math, and chemistry.

⁸⁴ Interview with Dan in Cambridge, Mass. (May 18, 2010). Dan was a chemical engineer who worked at global companies on product development, earning awards for his work, and who is a named coinventor on several patents. Eventually, he retired early to work on music composing and performing full time. He currently runs a nonprofit community opera company that performs his operas, as well as others.

⁸⁵ Interview with Kevin, *supra* note 48.

competitive advantage”—a tactic she says “just garner[s] ill-will in the field.”⁸⁶ These accounts of slowing or stifling the promotion of progress, usually defined as circulating ideas and developing new ones in a competitive environment of good will, are explained through legal assertions of IP that instead undermine the system’s goals. In this way, the system is characterized as diseased or infirm. As a filmmaker said about her frustrations with copyright licensing requirements, “at some point we need to come up with a system that does not preclude future generations from telling about our own patrimony and history.”⁸⁷

An effect of a system with these characteristics is not only that its products are slower to arrive or more costly to make but also that their quality may be compromised. Creators and innovators describe this happening in several ways: The first is as a “race to the bottom,” in the words of a biotechnology lawyer who describes how grandiose goals and cutthroat behavior diminish the possibility of anyone achieving or benefiting.⁸⁸ This is similar to the above accounts of holdout behavior. Several lawyers and scientists portray the problem as shooting for the moon and therefore missing other opportunities; an IP lawyer described this problematic behavior in his pharmaceutical clients, who tell him:

“We’re only interested in drugs that’ll generate a \$1 billion or more of revenue.” But the mistake they are making is, there are many ways to get to a billion. You can have ten drugs that’ll make \$100 million each, or you can have one drug that’ll make a billion. It’s very hard to always hit a homerun. And so Big Pharma has backed themselves into a huge corner.⁸⁹

This race to the bottom precludes or nullifies opportunities for iterative creative and innovative work, which is how most durable progress is made.

Second, a sclerotic system that induces risk-averse behavior produces mediocre results instead of cutting-edge results. Speaking about juried art contests aiming to reward and highlight the best public art, a renowned sculptor says the compromise at mediocrity is disillusioning: “[W]hat happens is that, you know, three members of the jury’ll feel very strongly about one, and three members’ll feel very strongly about another. They’ll both agree on a third one, so it’s kind of the . . . [one for which] there’s the least amount of objection to that one. Which I don’t think . . . makes for the best art choice.” Compromises in quality stem from battles over control, which may relate to ego, liability issues, financial risk-averseness, or superficial metrics of salability. An information architect who designs information systems through website

⁸⁶ Interview with Ilene in Bos., Mass. (Aug. 28, 2012). Ilene is a genetic biologist and patent attorney with a boutique law firm. She was a university research scientist with several years first in academia and many more in the pharmaceutical industry.

⁸⁷ Interview with Ann, *supra* note 67.

⁸⁸ Interview with Dennis in Cambridge, Mass. (Aug. 8, 2008). Dennis is an in-house patent counsel at a publicly traded, global pharmaceutical company. In an earlier career, Dennis worked in similar positions as in-house patent counsel for similarly large pharmaceutical companies.

⁸⁹ Interview with Michael, *supra* note 49.

interfaces describes similar counterproductive pressures in relation to issues concerning client retention and cost from upper management. He recounts a disagreement where he contended that he told his manager:

“I don’t approve of this. You know, we designed it one way, we tested this way. I can’t get behind this.” She was like, “I need you to get behind this.” I said, “I mean, I will do it, but I can’t tell you it’s the best solution because we have already proven that it’s not.”⁹⁰

These pressures are often motivated by finances and aversion to cutting-edge creative and innovative work, which may be ahead of its time and prone to less obvious upsides. A system devoted to innovation and creativity should not diminish risk-taking; it should enhance it.

Interviewees describe the challenges of extracting themselves from the system producing these compromised results. Many creators and innovators describe how working alone (as a consultant or independent contractor) can minimize the compounded harms of multiple, integrated systems that compromise their high-quality goals. Some eschew IP or contract lawyers altogether—as one artist said, hiring a lawyer “was the silliest waste of my money”⁹¹—others opt out of the for-profit system altogether. Whatever coping mechanisms exist, however, for most everyday creators and innovators, the IP regimes form an inescapable backdrop to their work that produces these unwelcome distortions of quality and process.

But haven’t the digital age and the internet’s connectivity enabled much more creativity and innovation, smoothing these rough problems or at least compensating for them in other ways? Many creators and innovators accept the positive and negative effects the digital age’s networks have on their working practice and its output—“accept” in the way one accepts that we all age, and aging is better than the alternative. There is no real option to go backward. People make do, as I explain in an earlier study of everyday creators and innovators.⁹² Nonetheless, they have specific complaints related to the quality of the work produced and the effort that good work requires to be noticed and valued, which makes the labor worthwhile. These sentiments are sometimes explained in terms of abundant “pollution,” scale, and crowding out.

⁹⁰ Interview with Matthew in Bos., Mass. (May 10, 2010). Matthew is an information architect with a background in software development and architecture who previously had his own company developing websites, e-commerce, and marketing strategies for a wide variety of companies. He is currently a senior account developer at an internet commercial and marketing company working with clients to develop strategies for internet interaction and client engagement.

⁹¹ Interview with Helen, *supra* note 73.

⁹² See SILBEY, *supra* note 33, at 84 (“Many respondents express frustration with the misfit between IP rules and the professional values that they cultivate in their daily work, like personal control over their time, fair earnings, and relationships. Too much or too little IP disturbs the flow of their work and its qualities they seek to develop.”).

For example, a film producer and advertising executive says “I’m the biggest music fan, . . . but I like music less ‘cause it doesn’t feel special anymore. It’s so cheap.”⁹³ The move from albums to individual tracks, from investing in tangible, expensive products—like albums and CDs—to intangible digital downloads or subscription services, has left many pondering whether the affordability of a much larger volume of music has led to a homogenization of music production and listening tastes. Photographers echo this sentiment, emphasizing how it not only takes more labor and investment to be noticed and paid as a professional photographer but it is also more time-consuming to share photographs for profit than just for fun.⁹⁴ A photographer who retired mid-career as a photojournalist to join a family business said:

[T]he world is awash in crappy photographs. . . . [W]hen a relative or friend says, “Hey check out [photos of] my kid’s blah—,” it’s not just “Look at this picture,” it’s “Log on and wade through fifty [photographs].” I mean, it’s my job . . . is the way I look at it. I’m working [to curate your photos]. Pay me. I’ll tell [you] which one you [should have] sent me, you know? This is the only one worth even looking at. It’s pollution.⁹⁵

These are complaints about diminished quality resulting from voluminous production and exhausting search costs to find the work that one values. It is also a complaint about the reduction in standards and the broadening spectrum of music, photographs, or other creative or innovative work that we have come to accept as good enough. I don’t hear complaints about the democratization of creative fields *per se*; in general, creators and innovators embrace the possibility of their fields being open to newcomers.⁹⁶ Instead, I interpret these complaints as about distorting what counts as good work because the system incentivizes scale and profit over excellence and distinction.

Financial insecurity is a regular source of stress for many creators and innovators, whose usual goal is simply to make enough to keep doing the work they do.⁹⁷ Most continue working at their profession because they are passionate about it and can make ends meet. A composer who quit his job as a chemical engineer put it this way: “[T]his is a lot less lucrative than being a senior chemical engineer. And if I were in it for the money, I would have made a very

⁹³ Interview with Theo in Bos., Mass. (Jan. 15, 2012). Theo was an advertising executive, with expertise in film and video, working in an internationally acclaimed advertising agency. He now makes films, including several shorts and a feature film that won awards at national and international film festivals.

⁹⁴ Interview with Sean in Bos., Mass. (Jan. 2, 2012). Sean is a former award-winning photographic journalist who worked with national and international newspapers. Sean left professional photography within a decade to work in a family business.

⁹⁵ *Id.*

⁹⁶ See SILBEY, *supra* note 33, at 247.

⁹⁷ See *id.* at 86-94 (analyzing accounts of interviews with range of scientists, engineers, musicians, writers, artists, business associates, and IP lawyers, focusing on interviewees’ efforts to earn a living in their fields).

poor choice of career.”⁹⁸ The experience of everyday creators and innovators who participate in the system of capital investment and market competition for labor and expertise, which should result in owning and profiting from the fruits of labor—a film, an invention, or a piece of art—does not resemble the hegemonic story of capital.⁹⁹ Lack of surplus value and high costs of necessary resources like distributional platforms, time, assistants, space, and material frustrate the establishment of sustainable and predictable livelihoods for those invested in doing the work from the ground up.¹⁰⁰ Without aid from an institution or organization that pays them separately and often reaps most of the rewards as owners or proprietors, everyday creators and innovators describe a system in which they play a main role but that role does not support them or their interests.¹⁰¹

Creators and innovators describe a system that largely exacerbates their sense of financial and relational precarity. They don’t have enough resources or trusted affiliations to continue working predictably.¹⁰² A musician who has other jobs on the side explained:

[P]eople are working musicians, but, you know, that looks like many different things, and that’s a hustle. You know, you could end up anywhere. But for some people, that’s fine. Like, you know, if you are a working musician, . . . you are playing with anybody—you know, anybody that’s got—who is paying you.¹⁰³

The precarity does not seem to extend to the intermediaries—lawyers, distributors, licensors, and large employers—who may also be clients or purchasers.¹⁰⁴ Interviewees describe difficulty in productively managing their investment in their work—what they put in and what comes out.¹⁰⁵ They also

⁹⁸ Interview with Dan, *supra* note 84.

⁹⁹ See SILBEY, *supra* note 33, at 88 (“[T]he marketplace for IP-protected goods . . . appears quixotic, counterproductive, and sometimes irrelevant.”); *supra* notes 27-33 and accompanying text (describing hegemonic story of capital in IP marketplace).

¹⁰⁰ See *id.* at 105.

¹⁰¹ See *id.* at 93 (explaining that while some creators leave jobs in companies to work for themselves and maintain autonomy over time and work, “the downside of going it alone is the uncertainty of IP’s payoff and the lack of commensurate pay for artistic production”); see also *supra* notes 72-78 and accompanying text (using interview with artists to demonstrate that creators and innovators feel forced to “accede to the will of the intermediary”).

¹⁰² See *supra* notes 78-80 and accompanying text (explaining that “take it or leave it” approach in IP markets makes innovators distrust IP intermediaries).

¹⁰³ Interview with Kim in N.Y.C., N.Y. (June 7, 2011). Kim is a musician with her own band and several albums. She tours with the band and also works in the healing arts in addition to performing.

¹⁰⁴ See, e.g., Interview with Ann, *supra* note 67 (“Now there’s also an entire industry that has grown around gathering, buying entire attic-fulls of footage that someone has turned into a business. They categorize it, they watch it, and then they sell it.”).

¹⁰⁵ See Interview with Theo, *supra* note 93 (“I guess there’s something dispiriting about

describe those who benefit from that investment as less often the creators and innovators but those who use, purchase, and build off the work.¹⁰⁶ These are the institutional actors and those at the top of institutions, not the individuals who work with or in the institution. They may also be anonymous consumers.¹⁰⁷ This produces an experience of exploitation.¹⁰⁸ The lack of a sense of shared fate among the many essential aspects and actors in the system—the individuals, the audience, and the institutional partners—drives those aspects and actors apart and forces them into defensive postures.

C. *Interdependence Rooted in Moral Consensus*

In addition to the systemic flaws just described, some of the most common and extreme complaints that are symptomatic of an ailing system relate to lying and “stealing.” Generally, these are complaints about an IP system that does not reward truth or dignity.¹⁰⁹ Writers regularly summarize, quote, and borrow from other writers and researchers as a matter of practice and craft,¹¹⁰ but they nonetheless fiercely criticize instances of plagiarism, i.e., close copying without attribution. One writer and journalist said:

[I]f you look at cases of plagiarism in journalism where it’s become a scandal or someone has actually been punished for it, it usually involves stealing—never just stealing an idea. Always stealing not just the idea, but actual phrases. Yeah. Quotes from people . . . I mean, that’s really going over the top. . . . It’s faking, because it makes it sound like you talked to that person when you actually didn’t right?¹¹¹

something you poured your heart into and spent thousands of dollars to record, and getting a point-0-three-cent reward.”).

¹⁰⁶ See *id.*; *supra* note 48 and accompanying text (identifying software as an area of knowledge and innovation that regularly builds off itself).

¹⁰⁷ See Silbey, *Fairer Uses*, *supra* note 10, at 864 (citing LAWRENCE LESSIG, REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY 98-99 (2008)) (“The reasonable expectation of ‘copyright consumer’ is that, as consumers, we do more than consume; we also share and repurpose content.”).

¹⁰⁸ See *id.* at 865 (“As we learned long ago, property (and copyright) is personal.” (first citing MARGARET JANE RADIN, REINTERPRETING PROPERTY 36-37 (1993); then citing CAROL M. ROSE, PROPERTY AND PERSUASION 105-06 (1994))); *supra* notes 78-80 and accompanying text (demonstrating feelings of exploitation that creators and innovators feel within their fields); *infra* Section II.C (explaining stealing or plagiarizing as affront to personal identity).

¹⁰⁹ See *supra* notes 60-63 and accompanying text (explaining imbalance between numerous creator inputs and minimal and distorted returns in IP system).

¹¹⁰ See Silbey, *Fairer Uses*, *supra* note 10, at 860-62 (explaining that “higher tolerance for infringement” exists among creators because “copying and being strongly influenced by others [is] an inevitable part of creativity”).

¹¹¹ Interview with Jennifer in Brookline, Mass. (Sept. 11, 2009). Jennifer is a journalist who was formerly bureau chief in Europe for an international news organization, is currently on-staff at a nationally syndicated radio station, and is coauthor of a well-regarded first book.

In the science and engineering fields, this kind of lying or stealing occurs through misrepresentation. Scientists and businesspeople confirm that copying without payment—infringement—is not as troubling as are misrepresentations in client negotiations or false advertising among pharmaceutical companies about quality testing results.¹¹² Some artists and scientists go as far as saying that this kind of misrepresentative “idea stealing” borders on criminal, like theft or fraud: “[M]y simple analogy is, is I think it’s wrong for other people to steal other people’s homework,” one biotechnology lawyer explained in the context of commercializing another’s research results without asking.¹¹³ An artist complained that copying her conceptual idea for an art installation “feels a bit dirty, like, ‘Yeah, they must be stealing something.’”¹¹⁴

These examples describe the personal affront of stealing or lying as the act of pretending to be someone you are not or pretending to have done something you did not do. Both affronts degrade by erasing another human being. To accomplish either type of theft, the thief gleans off another’s work and personality, perhaps even alleging to be that person or personality on the basis of claiming another’s work as her own.¹¹⁵ Artists and scientists are quite tolerant of creative and inventive borrowing because they understand it as necessary or usual for developing their own work and teaching their craft.¹¹⁶ Yet, many artists and scientists nonetheless distinguish those inevitable borrowing practices from the personality theft that accompanies lying about the origin of the work and benefiting from that lie. “[T]here’s a slippery slope in the claim of ownership. But . . . I’m not gonna go crazy about that,” one filmmaker said with regard to inevitable collages and mash-ups that happen in the digital age, “[a]s long as people are not claiming ownership of something they didn’t do.”¹¹⁷ To some, this may seem a contradictory and impossible distinction, but understanding the essential difference between a fair and unfair situation is critical to explaining

¹¹² See SILBEY, *supra* note 33, at 163, 165 (identifying various creators’ attachment to personal or brand reputation as feature of quality control and professional distinction and as reason to obtain IP rights).

¹¹³ Interview with Dennis, *supra* note 88.

¹¹⁴ Interview with Karen in N.Y.C., N.Y. (Feb. 6, 2011). Karen is an artist in her mid-forties with a growing international reputation, whose sculptures, paintings, drawings, and diverse installations have earned her international accolades, awards, and grants. She works on her art full-time and always has.

¹¹⁵ See Gordon, *Harmless Use*, *supra* note 1, at 459 (citing ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 28-35 (1974)) (“The normative preference for harm avoidance is probably based on a combination of considerations, such as a respect for the separateness and autonomy of persons . . . and the suspicion that a person who causes harm is subordinating another person to his or her own ends.”).

¹¹⁶ See Silbey, *Fairer Uses*, *supra* note 10, at 860 (“Many describe a much higher tolerance for infringement because they describe copying and being strongly influenced by others as an inevitable part of creativity.”).

¹¹⁷ Interview with Ann, *supra* note 67.

what everyday creators and innovators consider broken in a system aimed to promote the progress of the work they are committed to pursuing.

Indictments of value misalignment between behavioral norms and what the IP system allows run throughout the interviews, especially when creators and innovators draw on examples of infringing behavior for which the IP system should, but may not, account.¹¹⁸ Examples range from failure to pay for copies made (a value-of-labor argument) to not caring for the work in a way that is “respectful” (a dignity argument).¹¹⁹ For example, a general counsel for a copyright licensing clearing house explains his company’s philosophy of copyright in terms of a pitch to possible customers as follows:

[I]t’s the right thing to do to respect the fact that people are creating things that you’re using. You pay the electric company, you pay the landlord, and you pay your employees, you pay the paper company that delivers the paper you put in the photocopier - why aren’t you paying for the stuff that goes on the paper in the photocopier?¹²⁰

This explanation resonates with the “if value/then right” argument, which can be problematic for copyright because it ignores crucial copyright limitations and exceptions such as fair use and first sale.¹²¹ But this explanation is nonetheless characteristic of many IP ecosystem members who rely on revenue from usage fees and permissions to continue their work and who reasonably worry about being unable to continue because of nonpayment. A brand manager provides the compromise most creators seek in terms of copying and compensation in the context of proliferating fan fiction in the digital age:

Star Trek is a perfect example, OK? . . . If [J.J. Abrams] did a carbon copy of the original show—I mean straight from a Xerox machine—they’d still be angry. But there were more people who sat there and said, “Look: he is respecting it, but yet changed it in such a way that we all can enjoy it.”¹²²

¹¹⁸ See *supra* notes 31-33 and accompanying text (contrasting hegemonic story of protecting capital that drives IP theory with everyday creators’ and innovators’ thoughts on protecting progress separate from market progress).

¹¹⁹ See Interview with Steve in N.Y.C., N.Y. (June 7, 2011). Steve is a marketing and business executive who co-owns a small but prosperous company that focuses on developing brands and merchandise lines through brand extension for entertainment companies—film, television, and toys. Previously, he worked as an executive in marketing and development in Fortune 500.

¹²⁰ Interview with Samuel, *supra* note 64.

¹²¹ See 17 U.S.C. § 107 (2018) (“[T]he fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.”); *id.* § 109(a) (“[T]he owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.”).

¹²² Interview with Steve, *supra* note 119.

The notions of “respecting” the work and using it “humanely” both avoid its denigration and preserve its ability to be appreciated by others.¹²³ The brand manager further explains that his clients accept fan fiction from their works as long as the fan fiction “adher[es] to the core values of the characters”¹²⁴—which I interpreted to mean that, by preserving the characters’ integrity, in a similar manner, we might defend ourselves against reputational and dignitary injury.

These are excusably vague behavioral norms, originating as they do from the descriptions of personal, material, and existential transgressions that nonetheless resonate with the explicit values of equality, autonomy, and distributive justice.¹²⁵ They return us to values fundamental to contemporary democracies with origins in “ordered liberty”—a liberty that necessitates limited constraints and structure (the rules of law) to offer meaningful opportunities to thrive for its members.¹²⁶ As an in-house IP lawyer for a publishing company explains, he counsels his company to refrain from suit except under very limited circumstances when there is “clear infringement, . . . a no-brainer,” because “we need to take a principled stand. We just can’t go in there and try to leverage our property rights in a way that’s inappropriate.”¹²⁷ The animating idea behind “principled” restraint is that creators and innovators are invested in the same system.¹²⁸

This lawyer, like many clients who do the work rather than shepherd it, perceives the keys to the whole system, of which they are a small part, as forbearance and mutuality. The articulation of ethics for engaging with each other generates a culture and sustains communities of creative and innovative practices that are defined by a sense of shared fate in the future of good work.¹²⁹ Everyday creators and innovators describe an inevitable dynamism in their relationships with others working as they do. They see structure and relationality

¹²³ See Interview with David in Bos., Mass. (Sept. 29, 2011) (“If you took it and you profited for a good, humane cause, you have my blessing.”). David is a photographer who shows and sells his work, but also works part-time in retail. Earlier in his career, David worked full-time as a fashion and advertising photographer.

¹²⁴ Interview with Steve, *supra* note 119.

¹²⁵ See *supra* note 10 and accompanying text (introducing equality, privacy, and distributive justice as frames for contemporary discourses in IP law).

¹²⁶ The notion of “ordered liberty” originates in *Palko v. Connecticut*, 302 U.S. 319, 324-25 (1937), and concerns limitations on freedom that exist per the need for order in society. The concept of “ordered liberty” was one of the first standards by which provisions of the Bill of Rights were applied against the states through the Due Process Clause of the Fourteenth Amendment. See *id.*

¹²⁷ Interview with Bob in Bos., Mass. (July 8, 2008). Bob is an in-house counsel and vice-president of a large privately held publishing company that has educational and trade divisions with offices around the world. He has been in publishing nearly his entire career, with early stints as a litigator.

¹²⁸ See *id.*

¹²⁹ See *supra* notes 11-15 and accompanying text (distinguishing IP’s usual focus on harms to individual from this Article’s focus on harms to communities, systems, and institutions).

where IP law and its dominant explanation for incentives and productivity see isolated individuals and profit maximization. When the law and legal solutions see only individuals and not the structures on which we rely, communities fall apart.

Creators and innovators critique the system's misalignment with personal values and morals.¹³⁰ They also complain of its failure to explain how each person or institutional partner may be integral to the health of creativity and innovation at large and thus should be individually sustained for the good of the whole, even if at the cost of a net sacrifice to one part to feed another. The system's deficiencies become personal because of its failure to attend to that which is the profoundly personal: one's sense of belonging, intrinsic value, and opportunity in increasingly congested and capricious socioeconomic times.

CONCLUSION

IP law reproduces the problem of seeing individuals rather than social organizations by explaining creativity and innovation as incentivized by private property rights produced by "authors" and "inventors." So deep is the hegemonic tale of individualism in IP law that theoretical concepts such as "markets," "merit," and "pluralism" are stories of individuals, their preferences, and their characteristics, rather than anchoring concepts in accounts of systems and institutions that sustain forms of authority and power.¹³¹ These individual accounts persist despite IP law developing to provide for new business organizations—institutions not individuals. These laws recognize large employers who nonetheless are called "authors" under the Copyright Act,¹³² and new business practices that aggregate patents—patent assertion entities—even if they are not themselves inventors and the patents are not immediately or obviously useful or valuable.¹³³ Despite describing new corporate practices and organizations, IP law's explanations for these practices embed theories of self-interested hard work, market efficiency, and meritocracy in line with liberal and neoliberal theories that take the individual—person or firm—as the relevant object of study.¹³⁴ Default to paradigms of individual agency and independent

¹³⁰ See *supra* notes 83-87 and accompanying text.

¹³¹ See *supra* notes 27-33 and accompanying text (introducing interaction between current IP law and hegemonic system of capital).

¹³² Under U.S. copyright law, an employer is the author of a work made by an employee within the scope of their employment. See 17 U.S.C. § 201(b) (2018) ("In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title . . .").

¹³³ See Chien, *supra* note 12, at 1596 (defining nonpracticing entity or "patent assertion entity" as entities that use patents primarily to obtain license fees rather than to support development or transfer of technology).

¹³⁴ See generally C.B. MacPHERSON, *THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM* (1962) (exploring ideas about ownership in terms of concept of "possessive individualism"); Jessica Silbey, *The Mythical Beginnings of Intellectual Property*, 15 *GEO.*

motives ignores the socioeconomic structures that facilitate these practices leaving them and their critical features unexamined, such as their institutional authority, effects, and justifications.

The specific and detailed accounts from everyday creators and innovators challenge this hegemonic tale of aggregated individualism, fueling progress, and explaining outcomes or expectations. Their accounts describe social structure and context that predictably shape opportunities and reveal moral preferences. In contrast to a market-determined outcome based on aggregated, independently determined preferences for creative and innovative work—and misdescribed as “objective” or “neutral”—everyday creators and innovators describe a system that predictably underperforms according to reasonable measures of fairness, proportionality, and quality. Moreover, according to the everyday actors in IP-rich fields, the IP system fails to promote “progress of science and the useful arts” because it provides benefits only to a select few. And this happens repeatedly. What IP law, in its individualistic outlook, may consider to be uncoordinated and random winners and losers in a system that sets a consistent standard for creators and innovators to be IP originators, everyday creators and innovators consider to be a gambling system where the house invariably wins.

Contrary to the individualist outlook of IP-law justifications, everyday creators and innovators describe social organization and patterns of behavior that cultivate interdependence among actors and reveal reliance on implicit structures of action. This interdependence may be obscured in light of dominant theories of individual agency, but it is nonetheless apparent to everyday creators and innovators and explained by them as critical to sustained good work and opportunity within their creative and innovative ecosystems. Invisible interdependence and hidden structures of action hide the basis of normative behavior—for example, practices of sharing and borrowing that form systems of implicit cooperation.¹³⁵

But empirical accounts from everyday practice surface these norms and ethical concerns.¹³⁶ Protests of injustice or system failure resemble complaints about misaligned values or disagreement about basic moral principles that corrode and render irrational or unfair the systems and social structures in which they are situated.¹³⁷ This is consistent with the complaint that the system fails to acknowledge what is most important to its subjects and participants. In so complaining, criteria emerge for pursuing ethical action in the array of deep

MASON L. REV. 319 (2008) (describing IP doctrine’s mythology of the individual and ideology of individualism as the central beneficiary of and justification for rights).

¹³⁵ See *supra* note 110 and accompanying text (explaining that creators and innovators are generally more tolerant of copying that falls short of plagiarism).

¹³⁶ See SILBEY, *supra* note 33, at 274 (concluding that, for artists and scientists, “[w]ork itself is the goal. . . . These people work to be free, and free to pursue what interests them. . . . If they can work under favorable conditions, their work is a form of freedom”).

¹³⁷ See *supra* notes 119-24 and accompanying text (discussing interviewees’ experience with misalignment between IP system’s rules and behavioral norms in IP community).

value preferences among creators and innovators—criteria that can be anchored to the structure of interdependencies they recognize as inevitable and necessary. These criteria, which creators and innovators expect to be embedded in the structures of their work, are balance, proportionality, accountability, nonviolence, truthfulness, and transparency. These criteria define the conditions of production in art and science in the digital age and therefore promote the progress of both. As a framework for moving forward through the twenty-first century, we would need a compelling reason to ignore accounts from everyday creators and innovators whose work aims to progress science and art when the alternative is to rely on a theory of market individualism that seems to be doing more harm than good to democratic values and the rule of law.